No. 82-1295

IN THE
Supreme Court of the United States
October Term, 1983

ESCAMBIA COUNTY, FLORIDA, *et al.*,
Appellants,

v

HENRY T. McMILLAN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND RESPONSE OF APPELLANTS KENNETH J. KELSON, MAX L. DICKSON, JOHN E. FRENKEL, JR., BILLY G. TENNANT, GERALD WOOLARD AND MARVIN BECK TO SUPPLEMENTAL BRIEF OF APPELLEES

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MOTION OF APPELLANTS KENNETH J. KELSON, MAX L. DICKSON, JOHN E. FRENKEL, JR., BILLY G. TENNANT, GERALD WOOLARD AND MARVIN BECK FOR LEAVE TO FILE RESPONSE TO SUPPLEMENTAL BRIEF OF APPELLEES.

Pursuant to Sup. Ct. R. 35, Appellants Kenneth J. Kelson, Max L. Dickson, John E. Frenkel, Jr., Billy G. Tennant, Gerald Woolard and Marvin Beck, through counsel, hereby move this Court for leave to file a response to the Supplemental Brief of Appellees. The grounds supporting this motion are as follows:

1) The Supplemental Brief of Appellees questions whether this appeal may go forward and, if so, whe-

ther one of the primary issues involved in the appeal has been rendered moot;

2) The seriousness of appellees' allegations and the consequences which could result if the Court were to accept them make necessary a response to appellees' brief;

3) Counsel for appellants received the Supplemental Brief of Appellees on January 6, 1984, only four (4) days, two (2) working days, prior to the January 10, 1984 oral argument in this action;

4) Due to the proximity in time to the oral argument and the preparations for that argument, counsel for appellants had insufficient time prior to the oral argument to research and prepare a response to the Supplemental Brief of Appellees;

5) In this regard, it is noteworthy that the majority of the Supplemental Brief of Appellees is devoted to events which took place approximately one (1) month before appellees filed their brief;

6) Nevertheless, appellees waited until almost the last possible moment before the oral argument to address these events;

7) The remaining matters raised in the Supplemental Brief of Appellees pertain to events which took place on the same day appellees mailed their eleven (11)-page, printed brief; and

8) The Court should be aware of the circumstances surrounding the ability of appellees to accomplish this task.

For the foregoing reasons, the Court should grant appellants leave to file the accompanying response to the Supplemental Brief of Appellees.

Respectfully submitted,

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RESPONSE OF APPELLANTS KENNETH J. KELSON, MAX L. DICKSON, JOHN E. FRENKEL, JR., BILLY G. TENNANT, GERALD WOOLARD AND MARVIN BECK TO SUPPLEMENTAL BRIEF OF APPELLEES.

Appellants Kenneth J. Kelson ("Kelson"), Max L. Dickson ("Dickson"), John E. Frenkel, Jr. ("Frenkel"), Billy G. Tennant ("Tennant"), Gerald Woolard ("Woolard") and Marvin Beck ("Beck"), through counsel, submit this response to the Supplemental Brief of Appellees.

ARGUMENT[1]

I. The Implementation of Relief While an Appeal Is Pending Should Not Deny the Right of Appeal.

Appellees' contention that the vote to dismiss this appeal by three (3) of the five (5) persons elected on No-

[1]Citations to materials which appear in: the Jurisdictional Statement are to "J.S.;" and the Joint Appendix are to "J.A."

vember 1, 1983, under the district court's single-member district election system and apportionment plan precludes maintenance of this appeal[2] raises the issue whether the implementation of relief while an appeal is pending may deny the right of appeal. This issue is particularly significant because there is a serious question whether the court which, on March 11, 1983, issued the Order[3] resulting in the election of the three (3) persons ever had jurisdiction over the case.[4]

A. The Persons Who Voted To Dismiss the Appeal Should Not Be Allowed To Assume Any Role as Appellants or To Affect the Maintenance of This Appeal.

The persons who voted to dismiss the appeal are the direct beneficiaries of the relief appellees have sought. Indeed, one of those persons, Willie J. Junior ("Junior"), is a member of the appellee class. As such, he already is an appellee to this action. His status as an appellee emphasizes the extent to which the interests of those elected under the district court's Order who voted to dismiss the appeal directly conflict with the interests of the original

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[2]Supplemental Brief of Appellees at 4-11. The three (3) persons who voted to dismiss are: Phillip M. Waltrip; Grady Albritton; and Willie J. Junior. Kelson and Dickson voted against dismissal.

[3]McMillan v. Escambia County, Florida, PCA No. 77-0432 (N.D.Fla. Mar. 11, 1983), *appeal docketed,* No. 83-3275 (11th Cir. Apr. 27, 1983), *petiton for cert. before judgment denied,* ____ U.S. ____, 104 S.Ct. 108 (1983). (A copy of this Order is attached as Appendix B to the May 18, 1983 Application for Stay of Enforcement of Judgment of the United States Court of Appeals for the Fifth Circuit filed in this Court.)

[4]*See* Brief of Appellants at 27-29 & n. 105; Reply Brief of Appellants Kenneth J. Kelson, Max L. Dickson, John E. Frenkel, Jr., Billy G. Tennant, Gerald Woolard and Marvin Beck at 3-6 & nn. 17 & 21, 15-16.

appellants.[5] As such, the vote to dismiss should be given no effect.

Further, this Court should not allow the persons who voted to dismiss the appeal to assume any role as appellants so as to deny the original appellants of their right of appeal.[6] To do so under the circumstances of this case would create federal jurisdiction where it otherwise is lacking. Escambia and the County Commission have no control over the election process in Escambia because, under Florida law, that process is under the direction and control of Florida's Department of State.[7] Under these circumstances, there is no merit to appellees' claim that all appellants have no standing to maintain this appeal. Appellants should be allowed to clear their names and the original commissioner appellants should be allowed to regain their offices.

B. This Appeal May Be Maintained by Persons Sued in Their Individual Capacities.

Even if the Court gives effect to the vote to dismiss the appeal and considers as appellants the persons who cast the votes to dismiss, there may be no doubt that the appeal may go forward. As the caption of the Complaint[8] makes clear, appellees sued the members of the Escambia Coun-

[5]The vote to dismiss the appeal was 3-2; Junior cast the deciding vote.

[6]Appellants are aware of Sup.Ct. R. 40.3 which provides for the substitution in their official capacities by their successors of public officers who cease to hold office during the pendency of proceedings before the Court. In this case, however, the persons who voted to dismiss the appeal did not assume office under Florida law, as did the original commissioner appellants, but rather pursuant to a court order the validity of which is largely dependent on the outcome of this appeal.

[7]*See, e.g.*, Fla. Stat. §§ 97.012 (1981).

[8](J.A. 45.)

ty, Florida ("Escambia") Board of County Commissioners ("County Commission") in their individual and official capacities. Kelson was elected to the County Commission pursuant to Fla. Const. art. VIII, § 1(e), was in office when the suit was filed and remained in office at all times through the filing of this appeal and the Brief of Appellants. In addition, on November 1, 1983, Kelson was elected to the County Commission under the district court's election system and apportionment plan. Although, as appellees point out, the district court left Kelson and the other Commissioners in the case individually for purposes of enforcing any orders it might issue,[9] the fact nevertheless remains that there is a judgment outstanding against Kelson individually, and he should be allowed the right to clear his name.

In addition to Kelson, this appeal may be maintained by Dickson. Paragraph 10 of the district court's Pre-Trial Order[10] provided that when a defendant was substituted in his or her official capacity that person would be taken out of the case individually as well as officially and the successor would be substituted individually as well as as officially. Dickson, therefore, has been substituted individually and officially for one of the Commissioners who was in office when the appeal was filed, and he too may maintain this appeal.

The cases on which appellees rely to suggest that neither Kelson nor Dickson may maintain the appeal in their individual capacities fail to support appellees' position. For example, *Alianell v. Fossey*[11] does not stand for the prop-

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[9]Brief of Appellees at 5-6, 7.

[10]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. May 12, 1978). (J.A. 79.)

[11]114 So.2d 372 (Fla. Dist. Ct. App. 1959).

osition that Florida law "prohibits a suit against commissioners in their individual capacities[12]." That was not an issue in the case. In *Alianell,* the commissioners were not sued in their individual capacities. Rather, the suit was brought against the persons comprising the Dade County county commission. In holding that the suit "was not in appropriate form," the court concluded that "the individuals making up the county commission were not proper defendants" because, under Florida law, a suit to challenge the action of a county commission is not to be brought against the persons comprising the county commission but against the county.[13] Accordingly, insofar as appellees' Complaint in the instant suit was brought against the members of the County Commission in their official capacities, the Complaint suffers from the same defect as the complaint in *Alianell.*

Appellees' reliance on *Smuck v. Hobson*[14] also is misplaced. Again, there was no issue whether members of District of Columbia Board of Education could maintain an appeal in their individual capacities because the suit was brought against them in their official capacities. This difference explains why the court held that the former Superintendent of Schools, Dr. Hansen, could not maintain the appeal. The Board of Education decided not to appeal the district court's order and, thereafter, Dr. Hansen resigned as Superintendent. The court held that Dr. Hansen could not appeal in his official capacity because "[w]hatever standing he might have possessed to appeal as a named defendant in the original suit, however, disappeared when Dr. Hansen left his official position."[15] The

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[12]Supplemental Brief of Appellees at 8.

[13]*Alianell,* 114 So.2d at 373 & n. 2.

[14]408 F.2d 175 (D.C. Cir. 1969).

[15]*Id.* at 177.

court also rejected Dr. Hansen's subsequent motion "to intervene . . . in order to appeal as an individual" because the suit did not attack him personally and because, due to his resignation, a reversal or modification of the district court's order would have no effect on his tenure in office.[16]

Similarly, the court also held that Mr. Smuck, a member of the Board of Education, could not maintain the appeal. He was sued only in his capacity as a member of the Board,[17] an official capacity. The language of the opinion appellees quote[18] is taken out of context. Rather than concluding that Mr. Smuck could not maintain the appeal in his individual capacity, that language simply explains why a single member of the Board of Education could not maintain the appeal, in his or her official capacity, contrary to the will of the Board as a whole.

Moreover, appellees' position is in conflict with the position appellees previously have taken in this case. The appeal of that part of the district court's decision striking down the at-large system of electing persons to the Escambia School Board[19] was filed only by Carol Ann Marshall ("Marshall"), who appellees sued in her individual and official capacities. Even though the School Board voted not to appeal, appellees never objected to the maintenance of the appeal by Marshall; and her appeal went forward.

Following the Fifth Circuit's decision upholding the district court's decision with respect to the School Board,[20]

[16] *Id.*

[17] *Id.*

[18] Supplemental Brief of Appellees at 10.

[19] McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D.Fla. July 10, 1978) (Memorandum Decision). (J.S. 71a).

[20] McMillan v. Escambia County, Fla., 638 F.2d 1239 (5th Cir. 1981). (J.S. 30a.)

appellees took the position that Marshall had taken the appeal in her individual capacity.[21] Notwithstanding the provision in paragraph 9 of the Pre-Trial Order[22] that appellees would not seek attorneys' fees or costs against any defendant in his or her individual capacity, appellees sought from the district court an award of attorneys' fees and costs against Marshall personally.[23] In addition, appellees received attorneys' fees and costs from Marshall.[24] Accordingly, all appellants have standing to maintain this appeal.

II. Recent Events Have Not Rendered Moot the Remedy Issue.

Neither the March 11, 1983 Order imposing the district court's election system and apportionment plan nor the January 5, 1984 ratification by the three (3) persons who voted to dismiss the appeal of that election system and apportionment plan, which resulted in their election, renders moot the remedy issue. The issue before this Court with respect to the remedy is whether the lower courts erred in holding that no remedy adopted by the County Commission could be considered as a "legislative plan" and that,

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[21]Plaintiffs' Motion and Brief for Award of Attorneys' Fees and Costs ¶ 1. (This motion is reprinted in Appendix A to this brief.)

[22](J.A. 78-79).

[23]Plaintiffs' Motion and Brief for Award of Attorneys' Fees and Costs. By letter to counsel and Marshall dated December 7, 1981, the district court authorized appellees to file their motion for attorneys' fees and costs. (This letter is reprinted in Appendix B to this brief.)

[24]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. May 24, 1982) (Consent Judgment). (The Consent Judgment is reprinted in Appendix C to this brief.) As reflected by the district court's docket sheets (J.A. 27-28), there was a substantial amount of litigation over appellees' claim for attorneys' fees and costs against Marshall. The Consent Judgment simply provided an end to this protracted litigation.

therefore, it was necessary for a judicially-created election system and apportionment plan to be imposed.[25] The district court's March 11, 1983 Order, like its December 3, 1979 Order,[26] was a judicially-created remedy granting appellees proportional representation.[27] The court imposed that remedy because it held that the Fifth Circuit's decision in *McMillan v. Escambia County, Florida ("McMillan III")*[28] required it to do so.[29] As such, the district court

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[25] *See* Brief of Appellants at i, 42-49.

[26] McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D.Fla. Dec. 3, 1979). (J.S.59a.)

[27] *See infra* note 29.

[28] 688 F.2d 960 (5th Cir. 1982). (J.S.1a.)

[29] McMillan v. Escambia County, Fla., 559 F.Supp. 720, 725, 730 (N.D.Fla. 1983) (Memorandum Decision), *appeal docketed*, No. 83-3275 (11th Cir. Apr. 27, 1983), *petition for cert. denied*, ____ U.S. ____, 104 S.Ct. 108 (1983). It is noteworthy that, in substance, the March 11, 1983 Order is the same as the December 3, 1979 Order. The December 3, 1979 Order provides for a single-member district election system with five (5) districts and further provides: "District 3 was deliberately designed to effectuate a 55 per cent black population majority and a 60 per cent black electoral majority within the district. All other districts were designed without regard to race." McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1, app. at 2. (J.S. 59a, 63a.) Similarly, the March 11, 1983 Order provides for a single-member district election system with five (5) districts and apportions district 3 to provide a 63.5 percent black population majority and a 55.7 percent black registered voter majority. McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1, Exh. A at 4.

There may be no doubt, therefore, that both Orders grant appellees proportional representation. *But see* McMillan v. Escambia County, Fla., 559 F.Supp. at 729 (contention by district court that "devising an election plan of five districts, one of which contains a majority of black population and registered voters" does not provide "guaranteed proportionate representation"). By providing appellees with proportional representation, both Orders not only violate amended section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973 (West Supp. 1983), but also stand in conflict with this Court's rejection of the right to proportional representation in such cases as City of Mobile, Ala. v.

simply was implementing its interpretation of the decision herein appealed. If it becomes necessary for the Court to reach the remedy issue, its decision is likely to be dispositive of the issue of whether the district court was correct in imposing a judicially-created remedy, which

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Bolden, 446 U.S. 55, 75-76 (1980) (plurality opinion); *id.* at 86-88 & n. 10 (Stevens, J., concurring in the result); White v. Regester, 412 U.S. 755, 765-66 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971).

The fact that the remedy the County Commission adopted on remand, like the remedy it previously adopted, did not guarantee appellees seats on the County Commission in proportion to their population percentage, but rather with fourteen (14) percent of the seats, also led the district court, in dictum, to conclude that, even if it were not bound by the "law of the case," it would not have implemented as a "legislative plan" the County Commission's remedy because it would not have precleared the remedy under subsection 3(c) of the Voting Rights Act of 1965, 42 U.S.C. § 1973a(c) (1976). McMillan v. Escambia County, Fla., 559 F.Supp. at 726, 730. This conclusion is at odds with the Fifth Circuit's suggestion in *McMillan III* that, if it had adopted the other analysis which led to the decision in Wise v. Lipscomb, 437 U.S. 535 (1978), it would have allowed the County Commission's remedy to be implemented as a "legislative plan." 688 F.2d at 972 n. 25.

In arriving at this conclusion, the Fifth Circuit relied largely on its decision in the companion case of Jenkins v. City of Pensacola, Fla., 638 F.2d 1249 (5th Cir. 1981), *appeal* and *petition for cert. dismissed per stipulation*, 453 U.S. 946 (1981). In *Jenkins*, the court upheld implementation as a "legislative plan," without need for subsection 3(c) preclearance, of a remedy the Pensacola City Council adopted providing for a ten (10)-member city council with seven (7) members to be elected from single-member districts and three (3) members to be elected at-large. The County Commission's remedies provided for a seven (7)-member county commission with five (5) members to be elected from single-member districts and two (2) members to be elected at-large and, thus, are similar to the City Council's remedy. If this Court reaches the remedy issue and holds that the courts should have considered the County Commission's remedy as a "legislative plan," this Court's reasoning will aid the Eleventh Circuit in its disposition of the issues which have arisen on remand of the decision herein appealed.

remedy provides appellees with proportional representation. The March 11, 1983 Order, therefore, has not rendered moot the remedy issue.

Similarly, the January 5, 1984 action by the three (3) persons who voted to dismiss the appeal to approve the election system and apportionment plan[30] which resulted in their election may not render moot the remedy issue. That action, which appellees contend now should be considered the County Commission's remedy,[31] is totally inconsistent with the nature of a "legislative plan." A "legislative plan" is adopted prior to the effectuation of a remedy and is adopted for the purpose of providing the court with a remedy which reflects the legislative judgment of the entity which generally is responsible for redistricting and reapportioning.[32]

Here, the January 5, 1984 approval of an election system and apportionment plan took place subsequent to the district court's imposition of its election system and apportionment plan. The January 5, 1984 election system and apportionment plan, therefore, did not provide the district court with legislative guidance in its determination of a remedy. Rather, the approval of the district court's March 11, 1983 remedy only may be seen as a self-serving gesture

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[30]The apportionment plan approved on January 5, 1984, conflicts with the apportionment plan the County Commission adopted on December 22, 1981, in compliance with the "one person, one vote" standard provided for by the Florida Constitution and statutes, *see* Brief of Appellants at 17 & n. 79, 42 n. 157. By approving the district court's apportionment plan, the persons who voted to dismiss the appeal lawfully could not change the apportionment plan adopted on December 22, 1981.

[31]Supplemental Brief of Appellees at 3.

[32]*See, e.g.*, Upham v. Seamon, 456 U.S. 37, 41-42 (1982); Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978) (White, J.); *id.* at 548 (Powell, J.); White v. Weiser, 412 U.S. 783, 794-95 (1973).

by the beneficiaries of the relief appellees sought and obtained designed to ratify their method of election and to deprive this Court of jurisdiction over the remedy aspect of this appeal.[33]

Moreover, the circumstances surrounding the ratification of the district court's election system and apportionment plan also suggest that the vote should be disregarded. The vote was prompted by Junior[34] who, as previously discussed, is an appellee in this action. Further, this matter was raised only by appellees; and it was raised in an eleven (11)-page brief which was mailed on January 5, 1984, the same day as the vote on this add-on item to the County Commission's agenda. It is inconceivable that appellees could have written their brief, had it printed and mailed it on the same day as the vote unless appellees at least had some prior knowledge of the plan to urge and pass the vote at that time. The ratification of the district court's election system and apportionment plan should be given no effect and, in any event, should not render moot the remedy, or any other, issue present in this case.

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[33]It is unimaginable that the persons who now have adopted the district court's election system and apportionment plan would have adopted an election system and apportionment plan other than the one which the court ordered and which led to their election.

[34]*See* The Pensacola Journal, Jan. 6, 1984, at C 1, col. 2. (A copy of this article is reprinted as Appendix D to this brief.)

CONCLUSION

For the foregoing reasons, appellants have standing to maintain this appeal and recent events have not rendered moot the remedy issue; and for the reasons set forth in the Brief of Appellants and the Reply Brief of Appellants Kenneth J. Kelson, Max L. Dickson, John E. Frenkel, Jr., Billy J. Tennant, Gerald Woolard and Marvin Beck, the judgment of the Fifth Circuit in *McMillan III* should be reversed.

Respectfully submitted,

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APPENDIX A
Appellees' Motion for Attorneys' Fees and Costs Against Carol Ann Marshall

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HENRY T. McMILLAN, et al., Plaintiffs,	)	
vs.	)	PCA 77-0432
ESCAMBIA COUNTY, FLORIDA, et al., Defendants.	)	

PLAINTIFFS' MOTION AND BRIEF FOR AWARD OF ATTORNEYS' FEES AND COSTS

Pursuant to instructions from the Court dated December 7, 1981, plaintiffs move the Court to award reasonable attorneys' fees and costs, and as grounds therefor would show the Court as follows:

1. Pursuant to this Court's order of February 18, 1979, plaintiffs were determined to be the prevailing parties in this litigation and entitled to an award of attorneys' fees and costs by plaintiffs for work performed in the District Court up through and including December 31, 1978. By consent order dated August 31, 1981, this Court approved an agreement between the plaintiff and the defendants, School District of Escambia County; School Board of Escambia County; Peter Gindl, Richard Leeper, Lois Suarez, A.P. Bell, Frank Biasco, James Bailey, Carol Marshall or the successors in office, in their official capacities as members of the Escambia County School

Board for satisfaction of all plaintiffs' claims against said defendants for attorneys' fees and costs, but specifically reserving to plaintiffs the right to claim appellate attorneys fees against Appellant/Defendant Carol Marshall, individually. The mandate of the Fifth Circuit Court of Appeals issued on November 12, 1981, and by letter of December 7, 1981, the Court allowed plaintiffs to file appropriate motion and supporting affidavits for a claim of attorneys' fees and costs. Attached hereto are affidavits of J.U. Blacksher, Larry T. Menefee and W. Edward Still, attorneys for the plaintiffs in this action. These three affidavits reflect time spent by the plaintiffs' attorneys in behalf of plaintiffs claims herein. These three affidavits reflect the following time attributable to work protecting the interest of plaintiffs' in connection with the appeal filed by Defendant Carol Marshall, in her individual capacity as follows:

J.U. Blacksher	62.0
Larry T. Menefee	29.2
W. Edward Still	5.9
TOTAL HOURS	97.1

2. The accompanying affidavits of Mr. Still and Mr. Menefee reflect costs, not the subject of any prior orders of this Court, incurred by plaintiffs in relation to the appeal filed by Carol Marshall as follows:

Blacksher, Menefee & Stein, P.A.	$450.56
W. Edward Still	123.25
TOTAL COSTS	$573.81

3. In light of the standards enunciated by the court of appeals in *Johnson v. Georgia Highway Express,* and with

the guidance of the *Code of Professional Responsibility,* the plaintiffs request that the Court determine that a reasonable fee in this action would be $85.00 per hour, plus a contingent bonus of 50 per cent. Plaintiffs contend that in light of the protracted, highly contingent and uncertain nature of this litigation, the value of the rights which have been protected, experience of counsel and preclusion of other work, this fee request is reasonable.

WHEREFORE, plaintiffs move the Court for an award of attorneys' fees and costs in the amount of $12,954.06.

Respectfully submitted this 21st day of December, 1981.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of December, 1981, I served a copy of PLAINTIFFS' MOTION AND BRIEF FOR AWARD OF ATTORNEYS' FEES AND COSTS upon counsel of record: Louis Ray, Esquire, 6th Floor, Seville Tower, 226 Palafox Street, Pensacola, Florida 32501; Patricia D. Wheeler, Esquire, 28 West Government Street, Pensacola, Florida 32501; Charles Rhyne, Esquire, Rhyne & Rhyne, 1000 Connecticut Avenue, N.W., Suite 800, Washington, D.C. 20036; and Don Caton, Esquire, P.O. Box 12910, Pensacola, Florida 32521, by depositing same in the United States mail, postage prepaid.

/s/ Larry T. Menefee

ATTORNEY FOR PLAINTIFF

APPENDIX B
Letter from District Court Authorizing Appellees To Move for Attorneys' Fees and Costs Against Carol Ann Marshall

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Post Office Box 12347
Pensacola, Florida 32581

December 7, 1981

Winston E. Arnow
Senior Judge

TO COUNSEL OF RECORD AND
MS. CAROL ANN MARSHALL

RE: Henry T. McMillan, et al v. Escambia County, Florida, et al - PCA 77-0432

Dear Counsel and Ms. Marshall:

Under the consent order entered by this court on August 31, 1981, plaintiffs reserved only the right to claim appellate attorneys' fees against appellant/defendant Carol Marshall, individually.

The mandate has now come down so the case is ready for final disposition. By letter of November 19, 1981, the parties were asked what further action needs to be taken.

Mr. Menefee has responded, suggesting that plaintiffs be given three weeks in which to file appropriate motion seeking fees and costs on appeal against appellant Carol Marshall with defendants given two weeks to respond to such motion.

The only one to reply is Mr. Ray by a letter of December 3, 1981. Apparently he wrote his letter without looking at the order of August 31, 1981.

Accordingly, plaintiffs are required to file appropriate motion, with supporting affidavits for fees and costs claimed in connection with the appellate work against defendant Carol Marshall within fifteen (15) days after date.

In filing affidavits, plaintiffs, and any opposing parties, shall consider and comply with the requirements of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Mr. Menefee suggests that the "defendants" be given a two week period after plaintiffs file their motion. On the face of it, it would seem to me only Ms. Marshall is concerned. However, Mr. Ray has undertaken to express himself and it may be others wish to respond to any motion. Accordingly, Ms. Marshall, and all other defendants, have two weeks after plaintiffs file to respond to plaintiffs' motion.

Sincerely yours,

/s/ Winston E. Arnow
WINSTON E. ARNOW

WEA/jag

Counsel: James U. Blacksher, Esq.
Kent Spriggs, Esq.
Eric Schnapper, Esq.
Patricia Wheeler, Esq.
Charles S. Rhyne, Esq.
Larry T. Menefee, Esq.
Jack Greenberg, Esq.
Edward Still, Esq.
Louis F. Ray, Jr., Esq.
William S. Rhyne, Esq.

APPENDIX C
Consent Judgment Awarding Appellees Attorneys' Fees and Costs Against Carol Ann Marshall

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HENRY T. McMILLAN, et al., Plaintiffs,	*	
vs.	*	CIVIL ACTION No. 77-0432
ESCAMBIA COUNTY, FLORIDA, et al., Defendants.	*	

CONSENT JUDGMENT

The Court has before it the joint motion to approve consent judgment filed by the Plaintiffs and Defendant Carol Ann Marshall. Defendant Escambia County, Florida agrees that the Plaintiff's motion to hold it jointly and severally liable should be dismissed without prejudice. The Court after consideration of the motion of the parties determines that the proposed settlement is reasonable and fair and that such be and hereby is granted and approved.

Accordingly, it is therefore ORDERED, ADJUDGED, and DECREED as follows:

1. Plaintiffs' motion for attorneys' fees and costs, as amended, against Carol Ann Marshall filed herein on December 21, 1981 is hereby settled and dismissed.

2. Plaintiffs' claim in their motion of March 24, 1982

to have Escambia County, Florida held jointly and severally liable for attorneys' fees and costs claimed by plaintiffs in their motion of December 21, 1981 as amended is dismissed without prejudice.

3. Under the settlement Carol Ann Marshall shall pay $8,000 to plaintiffs. This sum settles all claims by plaintiffs for all attorneys' fees and costs attributed by plaintiffs to Carol Ann Marshall in all capacities in this matter. Plaintiffs state this attribution is for 49.6 hours at the rate of $85.00 per hour plus a 25% increment factor and includes $2,742 in costs.

4. All other motions pending with regard to this matter are hereby withdrawn.

DONE this 24 day of May, 1982.

/s/ Winston E. Arnow

UNITED STATES DISTRICT JUDGE

APPENDIX D
Article in January 6, 1984 Edition of the Pensacola Journal on Ratification of the District Court's March 11, 1983 Election System and Apportionment Plan

DISTRICT VOTE SYSTEM OK'd BY ESCAMBIA

By CRAIG PITTMAN
Journal Staff Writer

With a U.S. Supreme Court hearing only days away, the Escambia County Commission formally agreed Thursday to adopt the district voting system federal courts imposed on the county because of a voting rights suit.

The commission action came at the urging of Commissioner Willie Junior, the first black to serve on the board, who won his seat in the county's recent district elections.

Federal court judges ordered the switch to district elections to give blacks a better chance at electing one of their own to the commission. Previously all five commissioners were elected by all the voters in the county, under what is known as the at-large system.

Under the at-large system, blacks contended, a white candidate consistently stood a better chance of winning than a black one because whites outnumber blacks and both races tend to vote for their own candidate.

Charging that the at-large system discriminated against black voters, a committee of them filed suit against the commission in 1977. That suit is still on appeal. The U.S. Supreme Court has scheduled a hearing on the case next Tuesday morning.

One of the things the high court will be considering is a

request from the current commission to drop the case, conceding victory to the black plaintiffs.

On the day last month when the commission voted to drop the case, Junior also introduced a resolution to adopt the district voting system already imposed by the federal courts.

At that time, Junior could not get enough support for the resolution. On Thursday, however, he managed to pull together three of the commission's five votes to see the resolution passed.

The resolution formally sets the size of the commission at five members, each elected by the voters in his district on a staggered system. And its election district lines follow the ones approved by the federal judges.

The days of division are not over yet, though. The two commissioners who voted against the resolution, Kenneth Kelson and Max Dickson, have joined with four former commissioners in asking the Supreme Court not to drop the appeal of the voting rights suit.

The high court has said it will hear arguments from the current commissioners, the former commissioners and the black plaintiffs, all on the same day, before deciding whether or not to let Escambia County drop the case.